A

CIMB BANK BERHAD

v.

ZIMA PROPERTIES SDN BHD & ORS

B

COURT OF APPEAL, PUTRAJAYA
MAH WENG KWAI JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM ABD MAJID JCA
[CIVIL APPEAL NO: D-02-2843-11-2012]

C

20 MAY 2014

BANKING: *Loan agreement - Term loan and bridging loan - Proposal of loan restructuring - Whether loan restructuring implemented - Whether banking facilities wrongly and unilaterally restructured - Recovery of loan*

D

sum - Whether certificate of indebtedness conclusive proof of amount due and owing - Whether appellant's claim premature - Whether repayment of banking facilities by way of redemption of housing units

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Finding of fact by trial judge - Whether trial judge erred - Whether appellate*

E

intervention warranted

CONTRACT: *Agreement - Bridging loan - Loan agreement - Condition precedent - Interpretation of word 'shall' - Whether respondent complied with condition precedent for release of bridging loan - Default in loan*

F

drawdown - Whether appellant in breach of contract

The appellant, by way of a letter of offer dated 26 July 2005 and a general facility agreement dated 9 October 2005, granted the first respondent a term loan of RM2,000,000 and a bridging loan

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of RM9,000,000 which was secured by a guarantee and indemnity dated 9 October 2005 executed by the second and third respondents. The banking facilities were to assist the first respondent in its project to develop a land located in Kelantan. On 13 October 2005 and 26 October 2005, the sum of

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RM2,000,000 under the term loan was disbursed and the sum of RM2,293,125 was drawdown under the bridging loan. *Vide* a letter dated 30 December 2007, the appellant proposed the restructuring of the banking facilities and required the first respondent's acceptance by 13 January 2008. On 16 January

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2008, the respondents applied for the second progress payment and furnished invoices dated 2006. It was provided in s. 6.01(i) of the general facility agreement that the first respondent 'shall'

comply with all the additional conditions precedent. As the invoices furnished were outdated and fell short of the conditions precedent, the appellant, *vide* a letter dated 23 January 2008, requested the first respondent to furnish reports to show work progress and proof of sales and purchases. However, the first respondent failed to furnish the said reports. Since the first respondent did not have any confirmed sales, the appellant decided not to allow the first respondent to further utilise the bridging loan. The tenor of the term loan and the bridging loan therefore came to an end on 13 October 2008 and 26 October 2008. The appellant then issued a letter of demand dated 10 November 2008 demanding the amount of RM4,493,327.12 together with interest. The respondents failed to pay the sum due and owing to the appellant. Thus, the appellant commenced legal proceedings against the respondents. After a full trial, the trial judge dismissed the appellant's claim. The trial judge ruled that the appellant was in breach of contract for not fully disbursing the banking facilities. Hence, this appeal. The appellant assailed the impugned judgment of the High Court ('said judgment') on the grounds *inter alia* that the trial judge had erred in deciding (i) that the certificate of indebtedness was not conclusive proof of the amount due and owing under the banking facilities; (ii) the appellant's claim was premature as repayment of the banking facilities was by redemption of the housing units under the project; and (iii) the appellant had wrongly and unilaterally restructured the banking facilities. On the contrary, the respondents submitted that the learned trial judge was correct in deciding that the appellant's claim was premature and relied on the letter of offer dated 26 July 2005 which provided that the principal mode of repayment was by way of redemption of units sold.

Held (allowing appeal with costs; setting aside judgment of High Court)

Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) A certificate of indebtedness operates in the field of adjectival law and it excuses the bank from adducing the proof of debt. It is for the borrower to disprove the amount claimed. The trial judge erred in going against the entrenched principles. He who alleged fraud or manifest error on the face of the certificate must prove it. The respondents had failed to

A disprove, by clear and convincing evidence, that the amount demonstrated any manifest error in the certificate. (paras 19 & 20)

(2) In deciding that the terms of the letter of offer dated 26 July B 2005 prevailed over the facilities agreement, the trial judge had disregarded an important clause of the letter of offer which stated that in the event of any conflict between the terms between the letter of offer and the facility agreement, the facility agreement shall prevail. There was no ambiguity C concerning the meaning of the clause. The appellant's claim on 10 November 2008 was therefore not premature. (paras 23 & 24)

(3) For full utilisation and continued availability of the bridging loan, the first respondent was required to furnish reports on D the project upon the appellant's request and to enter into sale and purchase agreements with the purchasers of at least 70% of all the housing units to be developed. The word 'shall' appearing in the provisions clearly supported that the conditions precedent were mandatory and call for strict E compliance on the part of the first respondent. When interpreting the terms of contract, the court will give effect to the intention of the parties as expressed in the unequivocal language employed. Since the first respondent failed to do so, the appellant's action in refusing further drawdown and F terminating the facilities was justified and there was no question of the appellant having acted in breach of contract for not fully disbursing the banking facilities. (paras 26-28)

(4) The proposed restructure, if accepted and implemented, would G have converted the term loan and bridging loan into a term loan of RM4,293,000 with a tenor of two years. The first respondent did not accept the restructuring proposal before 13 January 2008. Therefore, the banking facilities were not restructured and were at all material times still continuing. The H respondent had applied for the second progress payment of the bridging loan *vide* letter dated 16 January 2008 and the appellant responded *vide* letter dated 23 January 2008 to furnish reports and proof of sales and purchase as required under the bridging loan. If the proposed restructuring was I implemented as alleged by the respondents, the subject matter referred to in the letters, that was the bridging loan, would have been extinguished. (paras 30-31)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, melalui surat tawaran bertarikh 26 Julai 2005 dan perjanjian kemudahan am bertarikh 9 Oktober 2005, telah memberikan responden pertama satu pinjaman berkala sebanyak RM2,000,000 dan pinjaman penyambung sebanyak RM9,000,000 yang telah dijamin oleh gerenti dan tanggungrugi bertarikh 9 Oktober 2005 yang dimeterai oleh responden kedua dan ketiga. Kemudahan perbankan tersebut adalah untuk membantu responden pertama dalam projek pembangunan sebidang tanah yang terletak di Kelantan. Pada 13 Oktober 2005 dan 26 Oktober 2005, sejumlah RM2,000,000 di bawah pinjaman berkala telah dibayar dan sejumlah RM2,293,125 telah dikeluarkan di bawah pinjaman penyambung. Melalui surat bertarikh 30 Disember 2007, perayu telah mencadangkan penstrukturan semula kemudahan perbankan tersebut dan memerlukan penerimaan responden pertama sebelum 13 Januari 2008. Pada 16 Januari 2008, responden-responden telah membuat permohonan untuk bayaran progresif kedua dan membekalkan invois-invois tahun 2006. Adalah diperuntukkan dalam s. 6.01(i) perjanjian kemudahan am bahawa responden pertama 'shall' mematuhi kesemua syarat terdahulu. Oleh kerana invois yang dibekalkan sudah lapuk dan tidak menepati syarat-syarat terdahulu, perayu, melalui surat bertarikh 23 Januari 2008, telah meminta responden pertama mengemukakan laporan yang menunjukkan kemajuan kerja dan bukti jualan dan pembelian. Walau bagaimanapun, responden pertama telah gagal mengemukakan laporan tersebut. Memandangkan responden pertama tidak mempunyai apa-apa jualan yang disahkan, perayu telah memutuskan untuk tidak membenarkan responden pertama terus menggunakan pinjaman penyambung. Tempoh pinjaman berkala dan pinjaman penyambung tersebut telah berakhir pada 13 Oktober 2008 dan 26 Oktober 2008. Perayu kemudiannya telah mengeluarkan satu surat tuntutan bertarikh 10 November 2008 bagi menuntut jumlah sebanyak RM4,493,327.12 bersama-sama dengan faedah. Responden gagal membayar jumlah yang masih terhutang kepada perayu. Justeru, perayu telah memulakan prosiding undang-undang terhadap responden. Selepas perbicaraan penuh, hakim bicara telah menolak tuntutan perayu. Hakim perbicaraan memutuskan bahawa perayu talah melanggar kontrak kerana tidak membuat pembayaran kemudahan perbankan sepenuhnya. Oleh itu, rayuan ini. Perayu menyangkal penghakiman

Mahkamah Tinggi yang dipersoalkan ('penghakiman tersebut') atas alasan, antara lain, bahawa hakim perbicaraan telah terkhilaf dalam memutuskan bahawa (i) sijil keberhutangan bukanlah bukti muktamad jumlah yang perlu dibayar dan terhutang di bawah kemudahan perbankan; (ii) tuntutan perayu adalah pramatang kerana bayaran balik kemudahan perbankan adalah dengan penebusan unit-unit rumah di bawah projek tersebut; dan (iii) perayu telah secara salah dan sebelah pihak menstrukturkan semula kemudahan perbankan tersebut. Sebaliknya, responden berhujah bahawa hakim bicara adalah betul dalam memutuskan bahawa tuntutan perayu adalah pramatang dan bergantung kepada surat tawaran bertarikh 26 Julai 2005 yang memperuntukkan bahawa cara bayaran balik utama adalah melalui penebusan unit yang dijual.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan penghakiman Mahkamah Tinggi)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Sijil keberhutangan yang berkuatkuasa dalam bidang undang-undang bersifat adjektif dan ia mengecualikan bank daripada mengemukakan bukti hutang. Peminjam yang harus menyangkal jumlah yang dituntut. Hakim bicara telah terkhilaf dalam melanggar prinsip undang-undang mantap. Sesiapa yang mendakwa kesilapan jelas pada sijil keberhutangan hendaklah membuktikannya. Responden telah gagal menyangkal dengan bukti yang jelas dan meyakinkan bahawa jumlah yang ditunjukkan dalam sijil tersebut mempunyai kesilapan yang nyata.

(2) Dalam memutuskan bahawa terma-terma dalam surat tawaran bertarikh 26 Julai 2005 mengatasi perjanjian kemudahan, hakim bicara gagal mengambil kira suatu klausa yang penting dalam surat tawaran yang menyatakan bahawa sekiranya berlaku apa-apa percanggahan antara terma surat tawaran dan perjanjian kemudahan, perjanjian kemudahan mengambil keutamaan. Tiada ketaksaan mengenai pengertian klausa. Tuntutan perayu pada 10 November 2008 adalah dengan itu tidak pramatang.

(3) Untuk penggunaan penuh dan ketersediaan berterusan pinjaman penyambung, responden pertama dikehendaki untuk memberikan laporan mengenai projek tersebut atas permintaan

perayu dan memasuki perjanjian jual beli dengan para pembeli sekurang-kurangnya bagi 70% daripada kesemua unit perumahan yang akan dibangunkan. Perkataan 'shall' yang terdapat dalam peruntukan jelas menyokong bahawa syarat-syarat terdahulu adalah wajib dan perlu dipatuhi oleh responden pertama. Apabila mentafsirkan syarat-syarat kontrak, mahkamah akan memberi kesan kepada niat pihak-pihak seperti yang dinyatakan dalam bahasa nyata yang digunakan. Oleh kerana responden pertama gagal berbuat demikian, tindakan perayu dalam keengganannya untuk membenarkan pengeluaran lanjut dan menamatkan kemudahan adalah berjustifikasi dan tiada persoalan mengenai pelanggaran kontrak oleh perayu atas kegagalan membuat pembayaran kemudahan perbankan sepenuhnya.

(4) Penstrukturan semula yang dicadangkan, jika diterima dan dilaksanakan, akan menukarkan pinjaman berkala dan pinjaman penyambung kepada pinjaman berkala sebanyak RM4,293,000 dengan tempoh selama dua tahun. Responden pertama tidak menerima cadangan penstrukturan semula sebelum 13 Januari 2008. Oleh itu, kemudahan perbankan tidak distrukturkan semula dan pada setiap masa masih berterusan. Responden telah membuat permohonan untuk pengeluaran bagi bayaran progresif kedua untuk pinjaman penyambung melalui surat bertarikh 16 Januari 2008 dan perayu telah membalas melalui surat bertarikh 23 Januari 2008 untuk mengemukakan laporan yang menunjukkan kemajuan kerja dan bukti jualan dan pembelian seperti yang diperlukan di bawah pinjaman penyambung. Jika penstrukturan semula yang dicadangkan telah dilaksanakan seperti yang didakwa oleh responden, hal perkara yang dirujuk dalam surat-surat tersebut, iaitu pinjaman penyambung, akan dihapuskan.

Case(s) referred to:

Bache & Co (London) Ltd v. Banque Vernes et Commerciale De Paris SA [1973] 2 Lloyd's Rep 437 ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Delta Enterprises Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor [2005] 1 CLJ 501 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***

For the appellant - Himahlini Ramalingam; M/s Lee Hishamuddin Allen & Gledhill
For the respondents - Mohammad Rafaei Adnan (Muhammad Syahri Adnan with him); M/s Rafaei & Co

[Appeal from High Court, Kota Bharu; Civil Suit No: 22-180-2008]

Reported by Sandra Gabriel

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This was an appeal by the appellant, CIMB Bank Berhad, against the judgment of the High Court at Kota Bharu, (Ahmad Zaidi bin Ibrahim J presiding), in which His Lordship had dismissed the appellant's writ of summons and statement of claim. The appellant had sought the following reliefs:

(a) that a judgment be entered against all the defendants in favour of the plaintiff for the sum of RM4,493,327.12;

(b) interest thereon at the rate of 3.0% (inclusive of a 1% penalty) per annum above the plaintiff's base lending rate, with monthly rests, from 4 November 2008 until full payment; and

(c) costs.

[2] Being aggrieved by the said judgment, the appellant had now appealed to this court urging reversal of the judgment of the learned trial judge.

[3] We had heard Puan Himahlini Ramalingam, learned counsel appearing for the appellant and Encik Mohamad Rafae bin Adnan, learned counsel appearing for the respondents. We had considered the rival submissions made by learned counsel for the parties and perused the appeal records. For the reasons that follow, we had unanimously allowed the appeal and set aside the judgment of the learned trial judge with costs of RM30,000 here and below. Deposits to be refunded to the appellant.

Facts Of The Case

[4] The brief antecedent facts of the case giving rise to this appeal can be summarised thus: The appellant by way of a letter of offer dated 26 July 2005 and a general facility agreement dated 9 October 2005, granted the first respondent a term loan of RM2,000,000 and a bridging loan of RM9,000,000. The banking facilities were to assist the first respondent in its project to develop a land located in Pasir Mas, Kelantan. The banking facilities were secured by a guarantee and indemnity dated 9 October 2005, executed by the second and third respondents in favour of the appellant.

[5] On 13 October 2005 and 26 October 2005, the sum of RM2 million under the term loan was disbursed and the sum of RM2,293,125 was drawdown under the bridging loan respectively.

[6] *Vide* a letter dated 30 December 2007, the appellant proposed the restructuring of the banking facilities and required the first respondent's acceptance by 13 January 2008, failing which the restructuring proposal was deemed to have lapsed.

[7] On 16 January 2008, the respondents applied for the second progress payment and furnished invoices dated in the year 2006. As the invoices furnished were outdated and fell short of the conditions precedent, the appellant, *vide* a letter dated 23 January 2008, requested the first respondent to furnish reports to show work progress and proof of sales and purchases. However, the first respondent failed to furnish the said reports.

[8] The first respondent's project area was prone to floods and the first respondent did not have any confirmed sales. Therefore, the appellant decided not to allow the first respondent to further utilise the bridging loan. The tenor of the term loan and the bridging loan therefore came to an end on 13 October 2008 and 26 October 2008 respectively.

[9] The appellant, through their solicitors, Messrs Lee Hishammuddin Allen & Gledhill, issued a letter of demand dated 10 November 2008. The appellant demanded for the amount of RM4,493,327.12, together with interest thereon at the rate of 3.0% (inclusive of a 1% penalty) per annum above the base lending rate, with monthly rests, from 4 November 2008 until full payment.

[10] The respondents having failed to pay the sum due and owing to the appellant, prompted the appellant to commence legal proceedings against the respondents. After a full trial, the learned trial judge dismissed the appellant's claim. Hence this appeal.

The Appeal

[11] Before us, the appellant assailed the impugned judgment on the following grounds:

(i) that the learned trial judge had erred in deciding that the certificate of indebtedness was not conclusive proof of the amount due and owing by the respondents under the banking facilities;

(ii) that the learned trial judge had erred in deciding that the repayment of the banking facilities was by redemption of the housing units under the project; and

(iii) that the learned trial judge had erred in deciding that the appellant had wrongly and unilaterally restructured the banking facilities.

[12] Before we embark upon the task of determining the merits or otherwise of the appeal, we would like to state at the outset that we were mindful of the principles of law that in respect of an appeal which turns upon a question of fact, an appellate court is generally very reluctant to disturb a finding of fact by the trial judge for the reason that as trier of fact, the trial judge has audio-visual advantage which we did not have. Nonetheless, it would be open to us to intervene with the finding by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself. (See *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (FC); *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320; [2013] 6 MLJ 523).

[13] We found this to be a case in which appellate intervention was warranted.

[14] We will now deal with the grounds of appeal advanced by learned counsel for the appellant in turn.

Ground (i): Certificate of Indebtedness

[15] Learned counsel of the appellant submitted that the certificate of indebtedness was the conclusive proof of the amount due and owing to the appellant. The appellant had relied on the two clauses to establish the conclusiveness of the certificate of indebtedness, that is, section 12.12 of the general facility agreement and in cl. 21 of the guarantee and indemnity. Section 12.12 is in the following terms:

> Certificate Of Indebtedness
>
> It is hereby agreed that any admission or acknowledgment in writing by the Borrower or by any person authorised on behalf of the Borrower or a judgment (by default or otherwise obtained against the Borrower) or a statement of account in writing showing the Indebtedness of the Borrower which is duly certified by an officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of Indebtedness in a court of law.

[16] And cl. 21 stipulates:

> Evidence Of Indebtedness
>
> Any admission or acknowledgment in writing by the Borrower or any person on behalf of the Borrower of the amount of Indebtedness and any judgment or award obtained by you against the Borrower or a statement signed by you as to the Indebtedness for the time being remaining unpaid to you by the Borrower shall be final and conclusive evidence (save for manifest errors) against me/us and shall be binding on me/us for all purposes.

[17] In reply, learned counsel for the respondents submitted that the certificate of indebtedness was defective and insufficient and not supported by the statement of accounts. It was the learned counsel's contention that the learned trial judge was correct in deciding that the monthly statement of accounts with regard to the banking facilities did not show the amount due and owing as at 3 November 2008 as per the certificate of indebtedness.

[18] With respect, the submission of learned counsel for the respondents was bereft of merit. It is axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the

certificate, determinative of the amount due. In *Bache & Co (London) Ltd v. Banque Vernes et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437 ("*Bache*") Lord Denning MR said at p. 440:

> I would only add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.

[19] The above articulation of the rationale underlying the legal acceptance of conclusive evidence clauses was approved in the Federal Court cases of *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 and *Cempaka Finance Bhd. v. Ho Lai Ying & Anor* [2006] 3 CLJ 544. The highest court of the land had decided that a certificate of indebtedness operates in the field of adjectival law, and it excuses the bank from adducing the proof of debt. It is for the borrower to disprove the amount claimed.

[20] We were of the considered view that the learned trial judge erred when His Lordship went against the entrenched principles and decided against the appellant when the respondents failed to disprove by clear and convincing evidence that the amount claimed and/or demonstrated any manifest error in the certificate. Indeed, he who alleges fraud or manifest error on the face of the certificate must prove it.

Ground (ii): Repayment

[21] Learned counsel for the appellant submitted that the tenor of the term loan and bridging loan was for a period of 36 months from the first drawdown. Since the sum of RM2 million under the term loan and RM2,293,125 under the bridging loan were disbursed on 13 October 2005 and 26 October 2005 respectively, the tenor of the banking facilities came to an end on 13 October

2008 and 26 October 2008. In support of his submission, learned counsel relied on items 16(iii), 16(iv), 18(iii) and 18(vii) of Schedule 2, of the general facility agreement.

[22] In reply, learned counsel for the respondents contended that the learned trial judge was correct in deciding that the appellant's claim was premature as repayment of the banking facilities was by redemption of the housing units under the project. Learned counsel relied on the letter of offer dated 26 July 2005 which provided for the principal mode of repayment was by way of redemption of units sold.

[23] In deciding that the terms of the letter of offer prevailed over the facilities agreement, the learned trial judge appeared to have disregarded an important clause enumerated at p. 6 of the letter of offer which reads as follows:

> All terms and conditions as specified in this letter of offer which are not inconsistent with the terms and conditions spelt out in the Facility Agreement shall apply and be binding with full effect, **in the event of any conflict between the terms between the Letter of Offer and the Facility Agreement, the Facility Agreement shall prevail**. (emphasis added).

[24] To our minds, there is no ambiguity concerning the meaning of the above clause and clearly the appellant's claim on 10 November 2008 is not premature.

[25] The learned trial judge also ruled that the appellant could only rely on the terms and conditions stated in items 16(iii), 16(iv), 18(iii) and 18(vii) of Schedule II, of the general facility agreement when the appellant fulfilled its part of the bargain. The learned trial judge further ruled that the appellant was in breach of contract for not fully disbursing the banking facilities.

[26] We did not agree with the findings of the learned trial judge. It is provided in section 6.01(i) of the general facility agreement that the first respondent shall comply with all the additional conditions precedent as stated in Item 13, Schedule I of the agreement. For full utilisation and continued availability of the bridging loan, the first respondent was required to furnish reports on the project upon the appellant's request, and to enter into sale and purchase agreements with the purchasers of at least 70% of all the housing units to be developed (see Item 13(d) and Item 13(x), Schedule I of the general facility agreement). The first respondent failed to do so.

[27] It was our considered opinion that in so deciding, the learned trial judge had failed to give effect to the true intention of the parties from the terms contained therein. In our judgment, the word 'shall' appearing in those provisions clearly supports the conditions precedent are mandatory and call for strict compliance on the part of the first respondent (See *Delta Enterprises Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor* [2005] 1 CLJ 501 (CA)). It is trite that when interpreting the terms of contract, the court will give effect to the intention of the parties as expressed in the unequivocal language they have employed. Such being the case, the appellant's action in refusing further drawdown and terminating the facilities was justified.

[28] Therefore, there was no question of the appellant having acted in breach of contract for not fully disbursing the banking facilities.

Ground (iii): Restructuring

[29] Learned counsel for the appellant submitted that the learned trial judge erred when His Lordship held that the appellant had wrongly and unilaterally restructured the banking facilities. The learned trial judge, in so deciding, relied on the appellant's letter dated 10 January 2008 which states as follows:

> With reference to your letter dated 21.01.2008, we write to inform you that the restructuring was done in accordance to the Bank's rights and powers under the letter of offer dated 26.07.2005 and facility agreement.

[30] With respect, the learned trial judge's finding ran counter to the contemporaneous documents. The appellant proposed by a letter dated 30 December 2007 the restructuring of the banking facilities and required the first respondent's acceptance by 13 January 2008. The proposed restructure, if accepted and implemented, would have converted the term loan and bridging loan into a term loan of RM4,293,000 with a tenor of two years. Based on the evidence before the court, the first respondent did not accept the restructuring proposal before 13 January 2008. Instead, the first respondent had instructed Messrs Wan Zainuddin & Co. to issue the letter dated 21 January 2008 demanding an explanation from the appellant. The appellant's letter dated 10 January 2008 had to be read in the above context. The said letter merely explained that the appellant was entitled to restructure the banking facilities.

[31] Further, as can be seen from the parties' subsequent actions, the banking facilities were not restructured and were at all material times still continuing. The first respondent *vide* a letter dated 16 January 2008, applied for a second progress payment of the bridging loan and the appellant had by its letter dated 23 January 2008, requested the first respondent to furnish reports and proof of sales and purchases as required under the bridging loan. If the proposed restructuring was implemented as alleged by the respondents, the subject matter referred to in the letters that is the bridging loan, would have been extinguished.

Conclusion

[32] For the reasons set out above, we accordingly allowed the appeal with costs.